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No. 95-672

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

CORAMAE ELLA GARY,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY and JAMES EDWARD LONG,

Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, *ET AL.* IN SUPPORT OF THE PETITION

(Additional *Amici Curiae* Listed On Inside Cover)

MARCIA D. GREENBERGER
Counsel of Record
VERNA L. WILLIAMS
JOANNA L. GROSSMAN
DEBORAH L. BRAKE
Attorneys for Amici Curiae
National Women's Law Center, et al.
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

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INTERESTS OF *AMICI CURIAE*

Amici curiae are organizations strongly committed to achieving equality for women and each has an abiding interest in ensuring the sound interpretation and application of the provisions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, that protect against sexual harassment in the workplace. Descriptions of the individual organizations are set forth in the attached appendix.[1]

REASONS FOR GRANTING THE PETITION

In a decision that subverts Title VII's important purpose of "'strik[ing] at the entire spectrum of disparate treatment of men and women' in employment," *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 453 U.S. 702, 707 n.13 (1978)) and conflicts with decisions of numerous circuit courts, the court below effectively immunized employers from liability for a supervisor's use of job-related threats to force an employee to submit to his sexual demands when the employer maintains facially adequate policies and procedures against sexual harassment. The court's decision: (1) adds to the existing split in the circuits by rejecting the established agency principle holding employers liable for hostile environment harassment by a supervisor who relies on his supervisory authority to accomplish the harassment; and (2) creates a split in the circuits by refusing to recognize quid pro quo harassment where a supervisor uses job-related threats to impose sexual demands on an employee unless the employee refuses the demands and suffers tangible economic harm as a result. Both rulings sharply conflict with other circuit court precedent and jeopardize Title VII's protection from sexual harassment in the workplace.

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1. The parties' written consent to the filing of this brief has been filed with the Court.

In exonerating defendant WMATA from liability for the sexual harassment endured by Ms. Gary, the court below adopted a standard for evaluating employer liability for a hostile work environment created by a supervisor's abuse of authority that is both erroneous and unfair. The court below refused to adopt the agency principle, endorsed by the majority of circuit courts, that an employer is liable for hostile environment sexual harassment by a supervisor who uses his delegated position to accomplish the harassment regardless of whether the employer had notice of the harassment or established complaint procedures to deal with sexual harassment generally. Instead, under the standard articulated by the court below, a plaintiff can never establish employer liability for hostile environment sexual harassment if the employer has provided adequate complaint procedures to address sexual harassment. This ruling also undercuts other independent agency principles that have been used by courts to find an employer liable for hostile environment harassment regardless of the existence of an employer policy against sexual harassment.

In addition, the analysis of Ms. Gary's claim for quid pro quo harassment in the court below represents a dramatic departure from the rulings of every circuit court to address the issue. The standard adopted by the D.C. Circuit will deny relief to employees who submit to their supervisors' sexual demands unless they can prove they suffered economic harm. No other circuit court has applied such a harsh standard, which provides harassers with the perverse incentive to perfect their harassment to ensure that their victims acquiesce. As a practical matter, then, the decision of the court below, rewards employers who employ effective harassers, thereby promoting greater harassment of women in the workplace.

Where, as here, the harasser had direct supervisory authority over the victim and used this authority to condition her continued

employment and job responsibilities on her tolerance of his sexual harassment, traditional agency principles and the purposes underlying Title VII dictate that the employer be held liable for the harassment, regardless of whether the harassment is labelled quid pro quo or hostile environment. The D.C. Circuit's decision to the contrary departs from the majority of circuit courts to address these issues and provides a welcome mat for increased sexual harassment of women, an untenable result. This Court should grant the petition and reverse.

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *MERITOR* AND WITH DECISIONS OF NUMEROUS CIRCUIT COURTS.

A. The Standard Adopted by the Court Below for Employer Liability for Hostile Environment Harassment Conflicts with *Meritor*.

This Court in *Meritor* directed lower courts to construct a theory of employer liability for supervisor harassment in hostile work environment cases rooted in agency principles. *Meritor*, 477 U.S. at 72. Underlying this instruction was an understanding that the courts would be required to look at the circumstances of the particular employment relationship and the job functions performed by the harasser in order to determine whether he acted as an agent of the employer. In making this determination, the fact that an employer had implemented a policy, for example, may be relevant to the determination of employer liability in a given case of supervisor harassment, but is not "dispositive." *Id.*

In contravention of this Court's directive in *Meritor*, the court below held that, as a matter of law, an employer is not liable for the hostile work environment created by a supervisor

provided that the employer has "adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences." (App. A, 12a).[2] In applying this standard to the instant case, the court below did not require actual, much less effective implementation of WMATA's sexual harassment policies before absolving them of liability for the pattern of supervisor harassment at issue. Moreover, this standard — even if it required a showing of efficacy — ignores the well-established agency principle set forth in Section 219(2)(d) of the Restatement (Second) of Agency that an employer is liable for wrongful acts committed by its supervisor where the supervisor's exercise of authority contributes to the wrongful conduct.[3]

B. The Standard Adopted by the Court Below for Employer Liability for Hostile Environment Harassment Created by a Supervisor's Abuse of Authority Conflicts with Numerous Circuit Court Decisions.

The majority of circuit courts to address the issue have relied on Section 219(2)(d) of the Restatement to hold employers liable for a supervisor's use of delegated authority to perpetrate hostile environment sexual harassment. *See, e.g., Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 114 S. Ct. 2693

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2. The decision below is reported at 59 F.3d 1391 (D.C. Cir. 1995). Citations to that decision in this brief are to Appendix A to the Petition for a Writ of Certiorari, wherein the opinion is reproduced.

3. Under this section of the Restatement, a principal is liable for the acts of a servant when "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." Restatement (Second) of Agency § 219(2)(d) (1958).

(1990); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 579 (10th Cir. 1990); *Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1557-60 (11th Cir. 1987). *Cf. Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1352 (4th Cir. 1995) (finding employer liable in constructive discharge case because supervisor "used [actual and apparent authority] to accomplish" the harassment). The decisions of these courts are entirely consistent with both the EEOC Guidelines, which "'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *Meritor*, 477 U.S. at 65 (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)), and subsequent agency interpretations.[4]

In a direct conflict with the decision below, the Second Circuit in *Karibian* explicitly adopted Section 219(2)(d) as a basis for holding an employer liable where a supervisor "capitalized upon his authority over [the victim's] employment to force her into a prolonged, violent, and demeaning sexual relationship." *Karibian*, 14 F.3d at 780. In *Karibian*, a case strikingly similar to the case at bar, the harassing supervisor used his authority over the plaintiff with respect to her job responsibilities and position to compel her to engage in sexual activity. The harassment was accomplished through the

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4. Under the EEOC Guidelines, an employer is liable for sexual harassment by a person acting in a supervisory capacity, regardless of whether the harassment is hostile environment or quid pro quo. *See* 29 C.F.R. § 1604.11(c) (1992). The EEOC's Policy Guidance on Sexual Harassment also endorses a theory holding employers liable regardless of notice where hostile environment harassment is accomplished through the use of supervisory authority. *See* EEOC Policy Guidance on Sexual Harassment, 8 F.E.P. Manual (BNA) 405: 6681, 6699 (March 19, 1990) ("[A]n employer also may be liable if the supervisor 'was aided in accomplishing the tort by the existence of the agency relation.'" (citing the Restatement (Second) of Agency § 219(2)(d)).

supervisor's threats to fire the plaintiff and ruin her career if she resisted his sexual demands. The Second Circuit ruled that an employer is liable under such circumstances, irrespective of the absence of notice or the existence of reasonable complaint procedures because the supervisor "abused his delegated authority to create a discriminatorily abusive environment." *Id.* at 780. Noting that the same abuse of authority subjects employers to strict liability for quid pro quo harassment, the court also observed:

> It would be a jarring anomaly to hold that conduct which always renders an employer liable under a *quid pro quo* theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment.

Id. at 781. The decision below neither acknowledged nor distinguished the Second Circuit's holding in *Karibian.*

The Eleventh Circuit's decision in *Sparks* further illustrates how other circuit courts have relied on agency principles to hold employers liable for conduct similar to that endured by Ms. Gary. In *Sparks,* the plaintiff claimed that her supervisor, who had authority over personnel matters including hiring and firing, sexually harassed her by subjecting her to unwelcome sexual advances accompanied by threats such as "you'd better be nice to me," and "your fate is in my hands." *Sparks,* 830 F.2d at 1556. Relying on Section 219(2)(d) of the Restatement, the Eleventh Circuit held that an employer is liable for a hostile environment created by a supervisor where the employer's delegation of authority empowered the supervisor to sexually harass the plaintiff, despite the absence of notice to the employer. *Id.* at 1559-60.

The court below was presented with facts virtually identical to those at issue in both *Karibian* and *Sparks*, yet rejected the same agency principle relied on by these circuit courts to hold employers liable for sexual harassment by a supervisor who abused his authority to accomplish the misconduct. The harassment at issue in this case is a classic example of using supervisory authority to create a hostile environment. Ms. Gary's supervisor, Mr. Long, hired her and had the power to discipline her, as well as the authority to fire her. (App. A, 3a). Mr. Long used this authority to subject Ms. Gary to ongoing harassment, for example, by telling her how he could make things easy for her on the job if she would give in to his sexual demands, and by ordering her to accompany him to the WMATA construction site where he assaulted and raped her. *Id.* In addition, he forced her to endure his sexual abuse by threatening to fire her if she reported the harassment. *Id.* Under the liability principles adopted by the courts in the cases discussed above, WMATA should be liable for Mr. Long's egregious conduct regardless of its available complaint procedures.

The agency principle adopted by the circuit courts discussed above also has been applied to hold employers liable for racial harassment by a supervisor who relies on authority delegated by the employer to perpetrate the harassment. *See, e.g., Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503, 1515 (11th Cir. 1989) (holding that the racially harassing conduct of a supervisor with authority to suspend and discipline employees as well as make personnel changes results in employer liability under agency standards). Thus, the court below disregarded the principle that employer liability for sexual harassment under Title VII should be evaluated under the same standard applied to racial harassment. *See, e.g., Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 373 (1993) (Ginsburg, J. concurring) ("Title VII declares discriminatory practices based on race [or] gender . . . equally unlawful"); *Meritor*, 477 U.S. at 67 ("[A] hostile or

offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.").

The rule adopted in the court below immunizing employers from liability for hostile environment harassment where they have adopted sexual harassment policies also conflicts with those courts that have relied on other agency principles to hold employers liable for hostile environment harassment regardless of the existence of a sexual harassment policy. For example, the Sixth Circuit has relied on Section 219(1) of the Restatement to hold employers liable where the harasser acted within the scope of employment.[5] *See Kauffman v. Allied Signal, Inc.*, 970 F.2d 178,183-84 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992). In addition, other courts have held employers liable for hostile environment harassment where they had actual or constructive notice of the harassment, but failed to take proper remedial action, under Section 219(2)(b) of the Restatement.[6] *See, e.g., Cortes v. Maxus Exploration Company*, 977 F.2d 195, 199 (5th Cir. 1992); *Stacks v. Southwestern Bell*, 27 F.3d 1316, 1327 (8th Cir. 1994); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1989); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994). By adopting a rule immunizing employers from liability based on the mere existence of a sexual harassment policy, regardless of whether the harasser acted within the scope of employment or whether the employer failed to respond despite notice of the harassment, the decision below undercuts these independent agency principles and is thus inconsistent with those courts that have applied them.

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5. Section 219(1) states that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) of Agency § 219(1) (1958).

6. This section imputes liability where "the master was negligent or reckless." Restatement (Second) of Agency § 219(2)(b) (1958).

The only circuit aligned with the court below in embracing the existence of a policy and grievance procedure as a complete defense to employer liability for sexual harassment is the Third Circuit. *See Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 110 (3d Cir. 1995) (existence of an effective grievance procedure divests harassing supervisor of apparent authority). In following *Bouton*, the court below relied on precedent relating to agency law particular to the Third Circuit which requires a victim's "belief in the agent's apparent authority to be reasonable" in order to impose liability on an employer. *Id.* at 109. However, the conclusion by the D.C. and Third Circuits that the mere existence of a policy against sexual harassment makes the victim's belief in the harasser's apparent authority unreasonable ignores the stark reality faced by victims forced to choose between enduring sexual abuse and risking their jobs, as well as the fact that adequate policies on paper often fail to guarantee justice in practice.[7] The better rule — and the rule adopted by other circuit courts — holds employers liable for a supervisor's exercise of delegated authority to create a sexually hostile work environment, regardless of the existence of employer policies against sexual harassment. This Court's guidance is needed to resolve this split in the circuits.

C. The Standard for Employer Liability for Supervisor Harassment Adopted by the D.C. and Third Circuits Will Threaten the Equality of Women in the Workplace.

Sexual harassment severely impairs women's potential for equality in the workplace and economic parity with men. As one commentator has observed:

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7. Indeed, when Ms. Gary finally reached her breaking point and reported the harassment through the employer's procedures, the employer concluded that the investigation yielded insufficient evidence to support her claim. (App. A, 4a).

> [Sexual harassment] makes women's jobs immensely more difficult, adding onerous demands and distractions. It inhibits job performance by placing women under pressure to tolerate or fulfill sexual conditions or leave work. Men do not labor under such burdens. The necessity to escape sexual harassment discourages women from remaining at one job long enough to acquire seniority and experience, to their detriment in employment.

Catherine A. MacKinnon, *Sexual Harassment of Working Women* 209-10 (1979) (hereinafter "MacKinnon"). Sexual harassment not only changes the focus in an employment relationship from the skills and abilities to the sexuality of an employee, but it also further degrades women by reinforcing traditionally inferior roles in the workforce. Theodore F. Claypoole, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation,* 48 Ohio St. L.J. 1151, 1153 (1987). Furthermore, the economic toll on an individual who has suffered sexual harassment may be extremely difficult to measure, especially in terms of the individual's loss of work productivity and the effect on her future career and employment decisions. In light of these consequences, the legal protections afforded by Title VII should be interpreted to maximize the law's deterrence of sexual harassment in the workplace.

In enacting Title VII, Congress placed employer behavior and liability squarely in the center of the law's protective scheme. *See Alexander v. Gardner-Denver,* 415 U.S. 36, 44 (1974) (noting that employers' "cooperation and voluntary compliance were selected as the preferred means" for reaching the goals of Title VII). Because Congress recognized that employers are best positioned to end discrimination in the workplace, it structured

Title VII to "create[] an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of sexist supervisors." *Horn v. Duke Homes*, 755 F.2d 599, 605 (7th Cir. 1985). The decision below removes this incentive and therefore frustrates the objectives of Title VII by allocating the cost of supervisor sexual harassment, which is accomplished through the exercise of authority delegated by the employer, to its victim rather than the employer.

II.

THE STANDARD FOR QUID PRO QUO HARASSMENT ADOPTED BY THE COURT BELOW CREATES A CIRCUIT SPLIT AND FURTHER UNDERMINES TITLE VII'S GOAL OF CREATING WORKPLACE EQUALITY FOR WOMEN.

A. No Other Circuit Court Has Adopted A Rule Requiring Victims of Sexual Harassment to Resist Their Harasser's Advances in Order to Recover for Quid Pro Quo Harassment.

Diverging from every federal court of appeals to address the issue, as well as the EEOC guidelines, the court below held that a claim of quid pro quo harassment under Title VII arises only if a supervisor actually "subject[s] the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." (App. A, 8a). That is, the court ruled that an employee who averts such consequences by *submitting* to her supervisor's threats cannot recover for quid pro quo harassment.

In a case directly analogous to the one at bar, the Second Circuit explicitly rejected this approach, recognizing a claim for quid pro quo harassment, despite the absence of any tangible economic harm, where an employee *submits* to her harasser's

demands in order to avoid the threatened adverse employment consequences. *See Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir. 1994) ("The supervisor's conduct is equally unlawful whether the employee submits or not."), *cert. denied*, 114 S. Ct. 2693 (1994). Similarly, the Ninth Circuit in *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994), held that submission to a supervisor's threats does not extinguish a claim of quid pro quo harassment, whether or not the victim suffers any economic harm. The approach of these courts is entirely consistent with the EEOC Guidelines, which recognize a claim of quid pro quo harassment when "submission to [unwelcome sexual advances] is made either explicitly or implicitly a term or condition of an individual's employment. . . ." 29 C.F.R. § 1604.11 (1994).

The decision below represents a marked deviation not only from *Karibian*, *Nichols* and the EEOC guidelines, but also from eight other circuits that have indicated that a quid pro quo plaintiff may show *either* that she refused her harasser's demands and therefore suffered tangible job detriment *or* that she submitted to his demands. *See Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st. Cir. 1990); *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 461 (7th Cir. 1990); *Spencer v. General Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1990); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987); *Highlander v. K.F.C. Nat'l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986); *Jones v. Flagship Int'l*, 793 F.2d 714, 721 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982).

No other court labors under the impression of the court below that tangible economic harm is the sine qua non of quid pro quo sexual harassment. The D.C. Circuit's erroneous ruling results from its failure to distinguish between quid pro quo cases in which the victim refuses the harasser's advances and those in

which the victim submits.[8] Indeed, the cases cited by the court below to support a requirement of economic injury in quid pro quo cases all involved an employee's refusal of her supervisor's sexual demands, and each suggests that such a requirement would not apply had the employee submitted.[9] As the Second Circuit explained in *Karibian*,

> in such "refusal" cases, evidence of some job-related penalty will often be available to prove quid pro quo harassment. But that is not to say that such evidence is always essential to the claim. In the nature of things, evidence of economic harm will not be

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8. Every circuit agrees that a refusal case, in which a supervisor makes an unwelcome sexual advance, the employee refuses to comply, and the supervisor subsequently takes some type of adverse employment action, presents a quintessential claim for *quid pro quo* sexual harassment. *See, e.g., Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992).

9. *See Highlander*, 805 F.2d at 648 (noting that *quid pro quo* harassment exists when "submission to the unwelcomed sexual advances of supervisory personnel was an express or implied condition for receiving job benefits"); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1127 (10th Cir. 1993) (recognizing that the "conditioning of tangible employment benefits upon the submission to sexual conduct" constitutes quid pro quo sexual harassment); *Kauffman*, 970 F.2d at 186 (explaining that a showing of tangible job detriment was an alternative to showing that the "employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits . . . ."). Only one case cited by the court below, *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992), suggests that economic injury might be a requirement of all claims of quid pro quo harassment. To the extent that *Kotcher* suggests that this requirement is necessary even if the victim submitted, it has been implicity overruled by *Karibian*, 14 F.3d at 778.

> available to support the claim of the employee who submits to the supervisor's demands.

14 F.3d at 778. By imposing a requirement of tangible economic harm for all quid pro quo claims the court below departed from these precedents.

Like *Karibian*, this case is one of submission rather than refusal.[10] Ms. Gary's supervisor raped her and then promised that he would fire not only her, but also her husband, if she reported the incident to anyone. (App. C, 21a). Ms. Gary submitted to her supervisor's demands and silently endured his sexual harassment in order to keep her job, despite the severity of the abuse. (App. A, 3a). Because Ms. Gary complied with his demands, Mr. Long had no occasion to carry out his threats to terminate her or her husband's employment. That Ms. Gary was allowed to keep her job in exchange for her submission and silence epitomizes quid pro quo sexual harassment. Nonetheless, the court below ruled that Ms. Gary did not present a viable claim of quid pro quo harassment because her harasser did not carry through with his job-related threats, thus adopting a standard that recognizes quid pro quo harassment only when the victim resists a harasser's sexual extortion and suffers the economic consequences. By failing to recognize Ms. Gary's quid pro quo claim, the court below has adopted an unnecessary, rigid rule that misapprehends the appropriate standard to be applied in submission cases,

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10. Moreover, even if this case could be characterized as a refusal rather than a submission case, it still would conflict with the Ninth Circuit's decision in *Nichols*, 42 F.3d at 511. In *Nichols*, the court recognized a claim for quid pro quo harassment where the supervisor threatens an adverse employment decision if the employee *does not* submit to his sexual advances, the employee refuses, but the supervisor does not carry out the threat. The *Nichols* court held this pattern to present a quid pro quo claim, concluding that "a supervisor's intertwining of a request for the performance of sexual favors with a discussion of actual or potential job benefits or detriments in a single conversation constitutes quid pro quo sexual harassment." 42 F.3d at 511.

disregards the EEOC's guidance, creates a clear split in the circuits, and ultimately encourages employers to hire harassers who ensure that employees submit to their actions in order to avoid liability. Such a result has no place in a principled Title VII analysis.

B. Requiring Women to Resist Their Harassers at the Risk of Job-Related Reprisals Will Have a Profound and Adverse Impact on Women in the Workplace.

Under the D.C. Circuit's ruling in the case at bar, quid pro quo harassment is not actionable under Title VII unless the employee experiences an actual economic loss as a result of refusing a supervisor's sexual advances. Such a distinction between those victims who comply with quid pro quo demands and those who refuse and suffer retaliation at the hands of their harasser is untenable, unwise, and outside the parameters of Title VII. Regardless of whether a supervisor is successful in his efforts to extort sexual behavior from a subordinate employee, the impact on his victim can be equally devastating.

The non-economic costs of submitting to or otherwise tolerating sexual harassment can be extremely high, psychologically as well as physically: "Like women who are raped, 'sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry.'" MacKinnon, at 47 (reporting findings of a survey by the Working Women United Institute that 78% of women who had experienced sexual harassment suffered from emotional or physical side effects). *See also,* Peggy Crull, *Stress Effects of Sexual Harassment on the Job: Implications for Counseling,* 52 Amer. J. of Orthopsychiatry 539-44 (identifying anxiety attacks, headaches, sleep disturbances, eating disorders, gastrointestinal disorders, nausea, weight loss or gain, and crying spells as likely effects of sexual harassment).

Beyond the predictable psychological and emotional effects described above, sexual harassment often has a direct impact on the working lives of women, even when they suffer no explicit economic harm such as wrongful termination. "Women who are harassed may experience lower productivity, less job satisfaction, reduced self-confidence, and a loss of motivation and commitment to their work and their employer." Barbara A. Gutek, *Responses to Sexual Harassment, in Gender Issues in Contemporary Society* (Stuart Oskamp & Mark Costanzo, eds. 1993), at 204; *see also The Civil Rights Act of 1991: Hearings on H.R. 1 Before the House of Representatives Committee on Education and Labor,* 102d Cong., 1st Sess. 169 (1991) (statement of Freada Klein) (hereinafter "Testimony on H.R. 1") (noting that sexual harassment results in "a loss of confidence in one's ability to perform one's job or to pursue one's career goals and diminished productivity at a statistically significant level."); Barbara Gutek & Mary Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment,* 42 J. Voc. Behav. 28 (identifying reduced job satisfaction and commitment to the organization as effects of sexual harassment).

The harm that Title VII is designed to remedy in sexual harassment cases is not lessened by the absence of actual economic harm:

> The employment discrimination consists not only in retaliation for refusal of advances, but also *in the imposition of the sexual condition itself,* which places the woman in the position of having to choose between tolerating or complying with sexual demands on the one hand and suffering employment deprivation on the other.

MacKinnon, *supra,* at 208. It is ludicrous to believe that women

who comply with the demands of their harassers "receive advantages even remotely comparable with the sexual harassment to which they are subjected." *Id.* Thus faced with the Hobson's choice between submission and job-related reprisals, the workplace for women subjected to this form of harassment becomes a demeaning, noxious, and dangerous place that is the source of "fear, anger, anxiety, depression," and diminished self-esteem. National Council for Research on Women, *Sexual Harassment: Research and Resources* 36 (1995) (citations omitted).

Furthermore, the ruling in the court below only invites sexual harassers to perfect their trade. A supervisor who is powerful, persuasive, or persistent enough to coerce an employee to succumb to his unwelcome sexual advances rather than to refuse and risk being fired is an ideal hire from the standpoint of precluding employer liability for quid pro quo harassment. Under the reasoning in the decision below, only a supervisor who makes threats but is unable to elicit the desired response from a subordinate employee will expose his employer to liability for quid pro quo harassment. This perverse incentive is not sanctioned by Title VII. As the Second Circuit recognized in *Karibian*:

> Under the district court's rationale, only the employee who successfully resisted the threat of sexual blackmail could state a quid pro quo claim. We do not read Title VII to punish the victims of sexual harassment who surrender to unwelcome sexual encounters. Such a rule would only encourage harassers to increase their persistence.

14 F.3d at 778. This Court should not countenance such a result.

The rule adopted by the court below is also blind to the reality that the most common response of sexually harassed women is to submit to a supervisor's advances rather than risk the economic and emotional peril of unemployment. "Real victims rarely tell the harasser to stop. They are often inhibited or constrained from doing so by the situation (*e.g.*, their supervisor is the harasser), or by their upbringing. . . ." Gutek, *Responses to Sexual Harassment, supra,* at 197, 205; *see also* Freada Klein & Mary Rowe, *Estimating the Cost of Sexual Harassment to the Fortune 500 Service and Manufacturing Firms, in Testimony on H.R.1, supra,* at 209 (concluding that fifty percent of women who experience sexual harassment each year try to ignore it or simply endure it); United States Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update,* (June 1988), at 11, 23-24 (noting that the most prevalent response for female victims was to tolerate the harasser's behavior silently).

Despite the "popular myth" that a woman who is really sexually harassed "immediately reports the incident, cuts off all connections with her harasser, and goes on with her life and career," most studies conclude, to the contrary, that "for a victim of sexual harassment, immediate response is the exception, not the norm." National Council for Research on Women, *Sexual Harassment: Research & Resources* (1995), at 32. The reluctance of most sexual harassment victims to take a stand against their harasser's abuse is lodged in fear of both retaliation and loss of privacy. *Testimony on H.R. 1, supra,* at 172. The fact is, moreover, that "[s]taggering numbers of women are forced by economic reality to keep up with their harassers," upon whom they depend for their "livelihoods, their psychological well-being and self-esteem. . . ." *Research & Resources,* at 34; *see also Nichols,* 42 F.3d at 510 ("For economic reasons, most workers cannot simply abandon their employment — new jobs are hard to find"). The economic reality that forces most women to submit to their harassers' advances only underscores the injustices bound to result if the decision below is left intact.

Finally, because a primary purpose of Title VII is to deter employers from discriminating against members of protected classes, there is no justification for singling out quid pro quo claims for a special, restrictive rule requiring economic harm. The statutory basis for quid pro quo claims derives from the same broad language as other Title VII claims. *Meritor*, 477 U.S. at 58-59. This Court in *Meritor* rejected tangible economic harm as a touchstone for a hostile environment claim under Title VII. *Id.* at 64. It should now take this opportunity to clarify that the same conclusion holds with regard to quid pro quo harassment under Title VII.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

MARCIA D. GREENBERGER
Counsel of Record
VERNA L. WILLIAMS
JOANNA L. GROSSMAN
DEBORAH L. BRAKE
Attorneys for Amici Curiae
National Women's Law Center, *et al.*
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
(202) 588-5180

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APPENDIX A—INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

The National Women's Law Center ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in insuring that Title VII adequately protects women from sexual harassment in employment.

The American Association of University Women ("AAUW"), a membership organization of 152,000 members with more than 1,600 local branches, promotes equity for all women and girls, lifelong learning, and positive societal change. AAUW has included freedom from violence, abuse, and sexual harassment as one of its platforms since laws against sexual harassment were developed. The AAUW Educational Foundation recently published *Hostile Hallways: a survey on Sexual Harassment in America's Schools.* AAUW believes that for women and girls to be truly equal participants at school and in the workplace, they must be free from the threat of sexual harassment.

Business and Professional Women/USA ("BPW/USA"), founded in 1919, promotes equity for all women in the workplace through advocacy, education and information. With 80,000 members in 2,800 local organizations throughout all 435 Congressional districts, BPW/USA is comprised of women and men of every age, race, religion, political party and socio-economic background. BPW/USA supports this *amicus* brief

because we understand that strong legal protection against sexual harassment is crucial if women are to achieve full economic equity in the workplace and society.

The Clearinghouse on Women's Issues ("CWI") was founded over two decades ago to exchange information and materials on issues related to discrimination on the basis of race, sex, age or marital status, with particular emphasis on public policies affecting the economic and educational status of women. CWI joins this brief because of its commitment to promoting equal opportunity in the workplace.

The Connecticut Women's Education and Legal Fund, Inc. ("CWELF") is a non-profit women's rights organization incorporated in 1973 with over 1,400 members. CWELF's mission is to work through legal and public policy strategies and community education to end sex discrimination and to empower all women to be full and equal participants in society. CWLEF seeks to join this brief as *amicus curiae* because of its work on sexual harassment issues for over two decades and because of its understanding of the devastation sexual harassment can cause in women's lives.

Equal Rights Advocates, Inc. ("ERA") is a San Francisco-based public interest legal and education corporation dedicated to working through the legal system to secure equality for women. ERA has a twenty-one year history of representing the interests of working women in the courts, legislatures, and public education campaigns. Since its early days, ERA has worked to end sexual harassment both through litigation and public policy initiatives. In addition, ERA advises hundreds of women each year through its advise and counseling "hot line" regarding their legal right to be free from this invidious form of discrimination. The firm also

provides technical assistance to scores of attorneys each year who are representing clients with sexual harassment claims. ERA has appeared before this Court as *amicus curiae* in dozens of sex and race discrimination cases interpreting Title VII and other anti-discrimination laws.

Federally Employed Women, Inc., ("FEW") is an international non-profit membership organization representing over one million civilian and military women employed by the federal government. Since its inception in 1968, FEW has focused on two primary goals: to eliminate sex discrimination and sexual harassment and enhance career opportunities for women in government. FEW has vigorously pursued activities designed to educate workers on the issue of sexual harassment, extend protection and relief to its victims, and ensure that employers and employees are held responsible for illegal acts.

The National Council of Jewish Women ("NCJW"), Inc. is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families, and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities around the country. The National Council of Jewish Women believes that individual liberties and rights guaranteed by the Constitution are keystones of a free and pluralistic society. Based on NCJW's National Resolutions stating our resolve to work for the "enforcement of sexual harassment laws and more stringent penalties for violators," we join this brief.

Since its inception in 1977, the **National Women's Conference Committee** ("NWCC") has supported the

grassroots movement for women's rights, as well as legal, economic, and social changes to ensure women's equality. The NWCC supports equal employment opportunity for women, and therefore opposes weakening legal protections against sexual harassment in the workplace. With affiliated networks in 34 state capitols (including Virginia), the Committee works to implement the 26-plank National Plan of Action for Women. The NPA, adopted by demographically representative delegates as part of the federally sponsored National Women's Conference, includes a plank supporting equal employment opportunity for women.

The Northwest Women's Law Center ("NWLC") is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Founded in 1978, the NWLC has been dedicated to the elimination of barriers to sexual equality in the workplace with a principle focus on the barriers created by sexual harassment. Toward that end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the country to ensure the availability of legal remedies for victims of sexual harassment. The NWLC also conducts employment and sexual harassment trainings and workshops, produces legal rights education materials on sexual harassment, and has led numerous legislative efforts to protect and advance the legal rights and remedies available to victims of workplace sexual harassment.

NOW-Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of

Appendix A

NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *cross-appeals dismissed per stipulation* (March 14, 1995), and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993).

Women Employed is a national membership association of working women based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that sexual harassment in the workplace is one of the chief barriers to achieving equal opportunity and economic equity for working women.

The Women's Law Project ("WLP") is a nonprofit, feminist legal advocacy organization located in Pennsylvania. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy advocacy and education. WLP has worked throughout its twenty-one year history to eradicate sex discrimination in the workplace. WLP believes that, if permitted to stand, the decision below will have a devastating impact on the right of women to be free of sexual harassment in the workplace.

The Women's Legal Defense Fund ("WLDF") is a non-profit, tax-exempt, national advocacy organization founded in

1971 to advance the rights of women in the areas of work and family. WLDF represents women and men challenging barriers to sexual equality, principally those in employment. It does so through litigation of significant cases, public education, and lobbying for improvements in the equal employment opportunity laws and in their interpretation.

Women Work! The National Network for Women's Employment represents more that 1300 local women's employment and training programs throughout the country who provide education and training to women who are entering, reentering, and/or training for the work force. A workplace free of sexual harassment is essential to women's well being and ability to perform and advance in the work force. Women Work! believes that employers must be held liable for sexual harassment accomplished by a supervisor's abuse of authority and urges the Supreme Court to clarify this issue in *Gary v. Long*, 59 F.3d 1392 (D.C. Cir. 1995)